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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
)
Deferral of Licensing of MTA Commercial)
Broadband PCS)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253
ET Docket No. 92-100

TO: The Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION
BY THE FULL COMMISSION
OF DENIAL OF COMMUNICATIONS ONE, INC.
EMERGENCY MOTION TO DEFER MTA PCS LICENSING

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EXECUTIVE SUMMARY

Communications One, Inc. ("Comm One") and GO Communications Corporation ("GO") request Commission reconsideration of the Wireless Bureau's Order dismissing Comm One's Emergency Motion to Defer MTA Licensing. Reconsideration of the decision to proceed with licensing the three winners of the most PCS market areas in the A/B auction is merited to address (1) the Bureau's failure to consider novel questions of law, and (2) changed circumstances in the interval following release of the Bureau's Order.

Reconsideration is warranted so that the Commission can consider that licensing PCS PRIMECO, L.P., AT&T Wireless PCS, Inc. and WirelessCo, L.P. without simultaneously licensing C block auction winners would violate Section 309(j) of the Communications Act. Section 309(j) requires the Commission to (1) avoid excessive concentration of licenses, (2) ensure broad distribution of licenses among a wide variety of applicants, and (3) provide opportunities for designated entities to provide new spectrum-based services. Licensing the A/B block at present would produce an enormous concentration of licenses in the top three winners, without ensuring broad distribution of licenses or providing opportunities for designated entities. The Commission should avoid these violations of the statutory mandates by deferring licensing the top three A/B winners until completion of the C block auction and substantial completion of the C block licensing process.

In addition, after the Bureau released its Order, the Commission decided to delay the C block auction not only for the length of time consumed by the Court-ordered stay but also for an additional length of time, but also for an additional inexplicable time period,

producing at a minimum a six month head start for A/B licensees. Unforeseeable delays are producing critical loss of investment for designated entities. The A/B licensees are already major telecommunications companies with name recognition, manufacturer contacts and supply networks already in place. Every day increasing their time-to-market lead will exacerbate their market power.

To the extent that the Commission analogizes Comm One's request for special temporary relief to a stay request, the Petitioners meet the requirements for a stay. The Petitioners are likely to prevail on the merits of their appeal because they fall squarely within the zone of interests that Congress sought to protect when it adopted the mandates of Section 309(j). Second, all designated entities, including Petitioners, will suffer irreparable harm in the absence of a stay due the severe competitive advantage that would go to the three largest A/B block licensees. Third, a stay will not injure the three largest A/B block licensees. Instead, it will fulfill congressional intent by levelling the playing field and requiring all competitors to line up at the same starting line and await the same "starter's pistol," rather than permitting some to jump the gun. A stay also will not harm the government; instead, it will preserve the public's overall profit by preserving the value of the C band spectrum. Finally, a stay will benefit the public interest by restoring compliance with the congressional mandates and establishing a marketplace that offers customers true choice from among a number of competitive service providers.

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Communications One, Inc. ("Comm One") and GO Communications Corporation ("GO"), by and through their attorneys (collectively, "the Petitioners"), hereby submit their joint petition for reconsideration of the Wireless Telecommunications Bureau ("Bureau") Order denying Comm One's March 8, 1995 "Emergency Motion to Defer MTA PCS Licensing." For the reasons stated below, reconsideration is warranted by (1) the Bureau's failure to consider novel questions of law, and (2) changes in circumstances in the interregnum since the Bureau's April 12 order. Moreover, to the extent that the Federal Communications Commission ("FCC" or "Commission") analogizes Petitioners' motion to a stay request, the requirements for issuance of a time limited stay are clearly met. Due to the crucial importance of this issue to all designated entities, the Petitioners request expedited reconsideration of the Bureau's action by the full Commission.

I. INTRODUCTION

A. Emergency Motion and Bureau Order

On March 8, 1995, Comm One filed an "Emergency Motion to Defer MTA PCS Licensing."^{1/} Relying on FCC Chairman Hundt's remarks indicating Commission intent to delay the C block auction pending the outcome of then-pending litigation,^{2/} Comm One asked the Commission to defer licensing the A and B block until after the conclusion of the C block auction so that all 30 MHz PCS licenses in any market area would be awarded simultaneously, rather than giving A and B applicants a substantial head start over C block licensees.^{3/}

On April 12, 1995, the Bureau dismissed Comm One's motion as an "untimely petition for reconsideration" of the Fourth Memorandum Opinion and Order in PP Docket No. 93-253 or, alternatively, as an insufficient request for stay.^{4/} The Bureau's Order failed to consider that, given the results of the A/B auction, the licensing of the three largest A/B block winners^{5/} (i.e., PRIMECO, AT&T and WirelessCo) would violate Section 309(j)

^{1/} See Communications One, Inc., Emergency Motion to Defer MTA PCS Licensing -- Action Requested Within 30 Days, filed March 8, 1995 ("Comm One Motion").

^{2/} See News, FCC Urges D.C. Circuit to Expedite Auction Case (Feb. 24, 1995) (Chairman Hundt stated that "'the timing of the [Entrepreneurs' Block] auction is now in the hands of the court,'" referring to the suit filed by Telephone Electronics Corporation ("TEC") in the United States Court of Appeals for the D.C. Circuit).

^{3/} Comm One Motion at 3.

^{4/} See Order, Deferral of Licensing of MTA Commercial Broadband PCS, GN Docket No. 93-253, ET Docket No. 92-100, DA 95-806 (released April 12, 1995) ("Order").

^{5/} As described more fully below, the vast majority of the A/B market areas were won by a few very large telecommunications companies. The largest winner was

(continued...)

of the Communications Act of 1934, as amended. Specifically, Section 309(j) requires that the Commission (1) avoid excessive concentration of licenses, (2) ensure broad dissemination of licenses among a wide variety of applicants, and (3) provide opportunities for Designated Entities ("DEs") to provide new spectrum-based services. See 47 U.S.C. § 309(j)(3)(B), (4)(D). In addition, the Bureau's Order failed to consider materially changed circumstances resulting from the stay of the C block auction issued by the U.S. Court of Appeals for the District of Columbia Circuit in Telephone Electronics Corporation v. F.C.C., No. 95-1015 (D.C. Cir. 1995). GO and Comm One, therefore, file this timely request for reconsideration of the Bureau's Order to (1) cure the statutory violations which necessarily flow from licensing the three principal A/B block auction winners prior to conclusion of the C block auction and substantial licensing of the C block auction winners, and (2) mitigate the adverse effects of the Court-ordered stay of the C block auction upon DEs seeking licenses.

B. Petition For Reconsideration

A reconsideration petition is the proper vehicle to obtain Commission correction of errors. Springfield Television of Utah, Inc. v. F.C.C., 710 F.2d 620, 629 (10th Cir. 1983); Action for Children's Television v. F.C.C., 564 F.2d 458, 468-69 (D.C. Cir. 1977).

5/(...continued)

WirelessCo, L.P., ("WirelessCo"), a partnership among Sprint, Tele-Communications, Inc., Cox Cable, and Comcast Telephony, which placed high bids in 29 market areas. See News (March 13, 1995); News, PCS Auction Update, at 2 (March 21, 1995). AT&T Wireless PCS, Inc. ("AT&T"), a sibling of wireless giant McCaw Communications, Inc., was the high bidder for 21 of the auctioned areas. PCS PRIMECO, L.P. ("PRIMECO"), a limited partnership comprised of AirTouch Communications, Inc., Bell Atlantic Personal Communications, Inc., NYNEX PCS, Inc. and U S WEST, Inc., affiliates or spin-offs of four of the seven Regional Bell Operating Companies, placed high bids for 11 licenses. Id.

Aggrieved parties should avail themselves of this avenue to ensure that the Commission has an opportunity to correct errors or to examine newly discovered evidence or novel legal or factual arguments before appeal to the judiciary. See Action for Children's Television, supra; Alianza Federal de Mercedes v. F.C.C., 539 F.2d 732 (D.C. Cir. 1976); Southland Industries v. F.C.C., 99 F.2d 117 (D.C. Cir. 1938).

GO Communications Corporation actively participated in the competitive bidding rulemaking proceeding.^{6/} GO is a small telecommunications business that intends to participate in the C block auction for licenses to provide PCS throughout one or more Basic Trading Areas ("BTAs"). As such, it is protected by the statutory requirements that the Federal Communications Commission ("FCC") must provide small businesses with opportunities to participate in provision of PCS, in a marketplace where licenses are not concentrated but rather are disseminated to a wide variety of applicants.^{7/} Because the Bureau's decision contravenes these mandates, GO joins Comm One in filing this joint petition for reconsideration pursuant to Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), as an aggrieved party whose interests are adversely affected by the Order.

^{6/} See Fifth Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, 9 FCC Rcd 5532, 5602 n. 136 (1994) ("Fifth Report and Order") (referring to GO's corporate predecessor, Columbia PCS, Inc.); Fifth Memorandum Opinion and Order, PP Docket No. 93-253, 10 FCC Rcd 403, 474-75 (1994) ("Fifth Memorandum Opinion and Order") (referring to GO and Columbia PCS). GO also moved to intervene in the recently dismissed litigation before the D.C. Circuit Court of Appeals. See Motion of GO Communications Corp. for Leave to Participate as Amicus Curiae and to Extend the Time for Filing Motion, Telephone Electronics Corporation v. Federal Communications Commission, No. 95-1015, filed March 3, 1995 (D.C. Cir. May 1, 1995).

^{7/} See 47 C.F.R. § 309(j)(3)(B), (j)(4)(D), set forth and discussed in detail infra § II(B).

Therefore, as parties aggrieved by agency action contravening the statutory mandates and as parties in interest to the competitive bidding proceeding, Petitioners request reconsideration of the Bureau's decision. Due to the crucial importance of this decision for the PCS and especially the DE community, the Petitioners respectfully ask that this request be decided expeditiously by the full Commission.^{8/}

C. Reconsideration By Commission Is Warranted

The Bureau rejected as inadequate Comm One's showing regarding the need for deferral of A/B licensing. Whether the motion is characterized as a request for special temporary relief or a stay request, the Bureau's action was erroneous as a matter of law. As discussed below, reconsideration is warranted by (1) the Bureau's failure to consider novel questions of law (e.g., Section 309(j)'s statutory mandates to the Commission), and (2) the changed circumstances (e.g., the likelihood of at least a six month delay between licensing of the A/B block and the C block). In the alternative, the Petitioners meet the requirements necessary for the Commission to stay the licensing of PRIMECO, AT&T and WirelessCo pending the conclusion of the C block auction.

II. RECONSIDERATION IS WARRANTED TO ADDRESS NOVEL QUESTIONS OF LAW

The Commission would act contrary to law, abuse its discretion, and act in an arbitrary and capricious manner were it to license the A and B block winners prior to even conducting the C block auction, let alone awarding C block licenses. It is well-established

^{8/} Petitioners acknowledge that this filing is technically a request for reconsideration by the Wireless Bureau, but due to the importance of the issue, we respectfully request immediate Commission reconsideration.

that agencies are creatures of statute and possess no authority beyond that given them by Congress. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1989); Stark v. Wickard, 321 U.S. 288, 309 (1944). In amending Section 309 of the Communications Act of 1934, Congress set forth specific objectives that the Commission must fulfill in issuing PCS licenses:

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. . . .

47 U.S.C. § 309(j)(3)(A)-(B) (emphasis added). By its plain terms, Section 309(j) requires the Commission to license spectrum to PCS applicants in a manner that (1) promotes competition; (2) avoids excessive concentration of licenses; and (3) ensures dissemination of licenses among a wide variety of applicants. Stated differently, the Commission may not issue licenses unless, inter alia, these requirements are met. 47 U.S.C. § 309(a), (j)(3)(B). The Commission's licensing of the three largest A and B block winners prior to the C block applicants defeats, rather than satisfying, these requirements.

A. Section 309 Requires the Commission to Avoid Excessive Concentration of Licenses

As noted, Congress charged the Commission with preventing the bulk of PCS licenses from ending up in the hands of a few major companies. The House Conference Report that accompanied newly-enacted Section 309(j) stated: "Consistent with the public interest, the purposes of this Act, and the characteristics of the proposed service, the Commission is also required to prescribe area designations and bandwidth assignments that promote an equitable distribution of licenses and services among geographic areas. . . ." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 483 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1172 ("Conference Report") (emphasis added). In addition, the House Report noted:

the Commission's regulations must promote economic opportunity and competition, and ensure that new and innovative technologies are readily accessible to the American people. The Commission will realize these goals by avoiding excessive concentration of licenses. . . . The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for new businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries.

H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 581 ("House Report") (emphasis added).

The results of the A and B block auction confirm how well-grounded and prescient were Congress' concerns about concentration. The A and B band PCS auction has resulted in an extreme concentration of licenses,^{9/} the very ill Section 309 sought to avoid. The top three bidders have obtained licenses covering over 66% of the total population areas ("POPs"), and only 10 firms account for over 95% of the licenses.^{10/} The egregious concentration that will result from the A and B auction can be measured by employing the

^{9/} See Kelley Declaration at ¶ 7.

^{10/} Id.

Herfindahl-Hirschman Index ("HHI"), the analytical tool used by the Department of Justice to ascertain the level of concentration in a particular market. The Department of Justice views an HHI of 1,800 as generally demonstrating such high market concentration that it will not permit companies in such a market to merge.^{11/} Applied to PCS, the HHI would be based on the number of service providers in a market and the individual market shares, generally measured by numbers of POPs won by each provider. An HHI analysis demonstrates that, if licensed prior to the C block, the A/B block will be highly concentrated, with an HHI of 2,010;^{12/} the top three bidders alone account for an HHI of 1,882, above the 1,800 benchmark established by the Justice Department. Were the Commission to proceed to license the three top winners in the A/B blocks without first determining whether this concentration would be diluted by the results of the C block auction, such action would directly violate the congressional mandate that the FCC conduct the licensing process in a manner that avoids concentration.

This extent of concentration is inextricably linked to the level of competition likely to exist in PCS and, more broadly, in wireless communication. Congress specifically sought to promote competition in these exciting new technologies. The entire thrust of the omnibus telecommunications legislation currently being considered by Congress is to foster greater competition across the industry. The creation of oligopoly structures such as will result from the A and B block PCS auction is not the competition mandated by Congress in Section

^{11/} See Department of Justice and Federal Trade Commission Joint Horizontal Merger Guidelines, ¶ 13,104 Trade Reg. Rep. (CCH) § 1.51 (1992) ("Merger Guidelines").

^{12/} Kelley Declaration at ¶ 8.

309(j)(3)(B). Given the Commission's design of the PCS auctions, and the results of the A/B auction, the competition necessary to fulfill the statutory imperative must come from the C block. Licensing the top three A/B auction winners at this time, therefore, would be unlawful.

**B. Section 309 Requires the Commission to Ensure
Dissemination of Licenses to a Wide Variety of Applicants**

Congress also sought to promote economic opportunity for entities other than giant, entrenched telecommunications providers. Specifically, Section 309(j)(3)(B) required the Commission to ensure DEs have the opportunity to become Commission licensees. The Conference Report stated: "The Conferees also . . . require the Commission to ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services. . . ." Conference Report at 1173 (emphasis added). Moreover, the House Report observed:

The Commission will realize these goals [e.g., competition, economic opportunity] . . . by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by minority groups and women. . . . [T]he Committee anticipates that the Commission will adopt regulations that will ensure that small businesses will continue to have opportunities to become Commission licensees, and ensure that the adoption of competitive bidding provisions of this section will not have the effect of excluding small businesses from the Commission's licensing procedures.

House Report at 581-82 (emphasis added).

However, to date, the DEs that Congress sought to ensure become licensees are still awaiting the commencement of the C block auction while three mega concerns reflecting an impermissibly concentrated PCS industry are poised to proceed to market. Such

circumstances flout the congressional objective that licenses be widely disseminated and DEs actually have the opportunity to participate in the PCS business. There is no indication that Congress intended small businesses and other DEs to be licensed in such a fashion that their ability to succeed in the marketplace would be seriously impaired because of a headstart given to established telecommunications providers by the FCC. On the contrary, in light of the outcome of the A/B auction, congressional intent to promote genuine competition and economic opportunity and prevent undue concentration can only be realized by a recoupling of the licensing process for the dominant applicants in the A/B auction and C block auction winners. A substantial delay in the licensing of the C block spectrum after the licensing of the dominant A and B block winners unquestionably will reduce the viability of new competitors.^{13/} If entry into the market by the winners of the C block auction is delayed, the dominant A and B band winners will have a substantial "head start" in the PCS business.^{14/} This will reduce drastically the chances of C block licensees being successful in the market, defeating the congressional objective of a diverse market.

As noted above, the HHI resulting from the A and B block PCS licensing process will be 2,010, far higher than the 1,800 which indicates a high market concentration. If licensed in conjunction with the C block, however, the PCS marketplace HHI falls to 893. Licensing

^{13/} Kelley Declaration at ¶ 12.

^{14/} Id.

the C block PCS applicants contemporaneously with the major winners in the A/B block would fulfill the congressional objectives of (1) promoting competition, (2) avoiding excessive concentration, and (2) ensuring a wide variety of PCS applicants. Thus, the Commission should defer licensing the top three A/B block winners until such time as the C band spectrum applicants can also be licensed.

III. **RECONSIDERATION IS WARRANTED BY CHANGED CIRCUMSTANCES**

Reconsideration by the Commission is warranted not only by the Bureau's failure to enforce the clear congressional mandate regarding the concentration and dissemination of licenses, but also by subsequent changes in circumstances. The Bureau's Order did not reflect (1) the incredible disruption of DE plans to participate in the C block auction resulting from the D.C. Circuit's stay of the C block auction after Comm One filed its motion, or (2) the two month delay in commencing the C block auction flowing from the Court-ordered stay and the Commission's decision not to proceed as fast as possible once the stay was lifted, in addition to the previously determined 75 days separating the A/B and the C block auctions.^{15/} Although the Order noted that the TEC court had stayed the C block auction,

^{15/} See Public Notice (rel. Feb. 10, 1995) (announcing that short form applications for C block auction would be due 45 days after the close of the A/B auction and the C block auction would commence 30 days thereafter); News, March 13, 1995 (Mar. 13, 1995) (announcing conclusion of the A/B auction). Thus, initially, the C block short form applications would have been due on April 28 and the auction would have commenced on May 29. See also Public Notice (rel. April 26, 1995) (stating that Commission considered C block auction start date as tolled during TEC stay and indicating that auction would continue to be delayed for indefinite period); Public Notice (rel. May 1, 1995) (setting June 15, 1995 as short form application filing date and August 2, 1995 as the date for commencement of the C block auction).

the Bureau's decision did not address at all the impact of that stay upon DEs' ability to attract capital. In addition, the Bureau's April 12 decision failed to contemplate that the total elapsed time between completion of A/B block auctions and the commencement of the C block auction would be a minimum of 3.5 months, with the likely gap between actual licensing of A/B block and C block winners lasting at least six months. These new facts merit reconsideration of the Bureau's Order.^{16/}

If the Commission refuses to defer the licensing of the three largest A and B block auction winners, the Petitioners will be placed at a severe competitive disadvantage vis-a-vis these A/B band competitors. That is, the A and B winners will be afforded a critical window of time to establish themselves in the market, at the expense of the DEs Congress sought to protect and promote. Business experts agree that "Speed is everything. It is the indispensable ingredient in competitiveness."^{17/} Moreover, "[t]ime plays a crucial role in many potential opportunities. In some emerging industries, there is a definite window of opportunity that opens only once."^{18/} Kevin Maroni, of Spectrum Equity Investors in Boston, stated that the TEC delay caused some companies that provided operating capital for designated entities to either postpone their decisions or walk away.^{19/} Counsel for a

^{16/} See 47 C.F.R. § 1.106(c), (b)(i).

^{17/} Welch, J., Get Better or Get Beaten (1994); see also, e.g., Ries and Trout, The 22 Immutable Laws of Marketing (1994) ("1. The Law of Leadership. It's better to be first than to be better. 2. The Law of Category. If you can't be first in a category, set up a new category you can be first in. The leading brand in any category is almost always the first brand into the prospect's mind").

^{18/} Bygrave, W., The Portable MBA in Entrepreneurship (1994).

^{19/} See Experts See Entrepreneurs Block Auction Delay Drying Up Financing Options, COMM. DAILY, Apr. 10, 1995, at 1 ("Experts See Delay Drying Up Financing").

woman-owned company, Windkeeper, stated that the TEC litigation would only "extend the head start" held by the A/B winners, and noted that companies like Windkeeper have spent "a lot of time and effort to bring together" their auction plans.^{20/} A Texas company that had not secured auction funding before the TEC stay was imposed asserted that investors now lack interest due to the delay.^{21/} The exceedingly large unforeseeable delay is producing similar lost investment throughout the DE community.^{22/} Due to the mandatory small size of these companies, the loss of one or two investors can mean the loss of the venture entirely.

Moreover, the existing wireless field is currently dominated by existing cellular carriers and established local telephone companies; these entities will gain an even stronger foothold by virtue of their "head start" in the PCS business.^{23/} Specifically, the A/B licensees will already control suppliers' choice of services, manufacturers who must choose which equipment to construct on their assembly lines, and customers who tend to reflexively purchase the few services to which they have become accustomed. The industry will be controlled by the first service providers with a substantial lead time to market.^{24/}

^{20/} See Appeals Court Stops Next FCC Spectrum Auction, COMM. DAILY, Mar. 16, 1995, at 1.

^{21/} See "Experts See Delay Drying Up Financing," supra.

^{22/} Moreover, as noted above, financial backers are fleeing DEs. Without financial backing, various DE groups will not be able to participate in the auction and will be shut out of the PCS market place. There is no remedy which would compensate for this exclusion from the PCS market place, and, absent a license deferral, there is no party from whom a remedy may be obtained.

^{23/} Kelley Declaration at ¶ 12; see also "Experts See Delay Drying Up Financing," supra n. 21.

^{24/} Section 309(j)(4)(C)(ii) requires the Commission to protect the economic interests of the designated entities, including the economic interests of small companies. Rather than follow this Congressional mandate, the Commission's unfair headstart policy is providing an enormous economic benefit to huge national and multinational communications conglomerates at the expense of the DEs.

The Bureau's conclusion that such concerns are "purely speculative" not only ignores the economics of the telecommunications market, but also clearly flouts the congressional requirement that the FCC take every precaution to ensure the success of designated entities. Accordingly, reconsideration is warranted to account for the competitive disadvantages foisted upon the DEs from the delay resulting from the TEC stay and the Commission's failure to accelerate the C block auction dates.

III. PETITIONERS SATISFY THE REQUIREMENTS FOR A STAY

Although Comm One previously filed an emergency motion to defer the A and B block licenses, to the extent the Commission analogizes the Petitioners' motion to a stay request, Petitioners clearly meet the requirements for grant of a stay. When determining whether to stay one of its actions, the Commission considers four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of its appeal; (2) the likelihood of irreparable injury to the requesting party in the absence of a stay; (3) the injury to other parties arising as a consequence of granting the stay; and (4) the potential for injury to the public interest. Storer Communications, Inc., 101 FCC 2d 434, 451 (1985) (citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)). Each of these factors weigh in favor of a stay in this case.

First, as discussed above, the licensing of the three largest A and B block spectrum winners will (1) result in an excessive concentration of licenses, and (2) fail to ensure a broad dissemination of licenses to a wide variety of applicants, in violation of the clear mandate of Section 309(j). Petitioners fall squarely within the zone of interests which Congress sought to protect when it mandated that the Commission fulfill these two requirements. As discussed in detail above, the results of the A/B auction yield a situation which is contrary to law. That illegality cannot be rectified until the results of the C block auction are known. To license the top three winners in the A/B block at this time therefore would be contrary to the public interest, convenience and necessity, and, consequently, prohibited. Thus, there is a substantial likelihood that the Petitioners will prevail on the merits.

Second, Petitioners will suffer irreparable harm if the stay is not granted because they will be placed at a severe competitive disadvantage vis-a-vis the three largest A/B band competitors. In the absence of the stay, the resulting delay in the licensing of the C block spectrum after the licensing of the A and B blocks will reduce the viability of new competitors.^{25/} That is, PRIMECO, AT&T and WirelessCo will already control suppliers' choice of services, manufacturers' choice of which equipment to construct on their assembly lines, and customers' reflexive purchases of the few services to which they have become accustomed. The industry will be dominated by the three largest providers by virtue of their substantial lead time to market, an advantage granted by government action.

Third, a stay would not injure the three largest A/B block licensees. Rather, the stay would effectuate congressional intent by requiring the dominant cellular carriers, telephone companies, and cable television operators to "line up" alongside their DE competitors and await the same "starter's pistol." That is, a competitor who would jump the starter's pistol cannot be said to be "injured" if he is forced to wait for his fellow competitors. Likewise, requiring the three principal A and B block winners to wait for the contemporaneous licensing of the C band winners would not injure the former; it merely levels the playing field as Congress intended.

Moreover, a limited stay will not harm the government. While a stay would result in a brief delay in receipt of the balance due on spectrum payments from A and B block winners, that is insufficient consideration to bar a stay. First, Section 309(j)(7)(A) expressly prohibits revenue generation from being determinative of the Commission's auction policies. Moreover, the government will be the ultimate beneficiary of higher payments for the C band spectrum if licensing of the dominant A/B winners is deferred pending completion of the C block auction. The current lag time between licensing of PRIMECO, AT&T, and WirelessCo and the conclusion of the contemplated C band auctions and substantial licensing of the C block winners will reduce the economic value of these auctions as bidders will pay less for the right to compete with firms that have already entered and thus have the advantage

^{25/} Kelley Declaration at ¶ 12.

of building consumers.^{26/} Accordingly, the overall profit to the government from the sale of spectrum will increase by the issuance of a stay and preserve the value to the government (and designated entities) of the C band spectrum.

Finally, a stay will benefit the public interest. Where Congress has determined the public interest, violations of federal law are presumed not to be in the public interest. Securities Industry Ass'n v. Bd. of Gov. of the Fed. Reserve Sys., 628 F. Supp. 1438, 1443-44 (D.D.C. 1986). In this case, the Commission has ignored clear congressional objectives which promote the public interest (e.g., competition, economic opportunity). Moreover, if the A/B block is licensed prior to the C block, PRIMECO, AT&T and WirelessCo will dominate the PCS marketplace and, in fact, the larger CMRS marketplace, controlling service provision throughout the majority of the geographic PCS market areas, over broad bands of valuable spectrum. The public interest would be better served by establishment of a marketplace that offers customers true choice from among a number of competitive service providers.

Thus, Petitioner satisfy the four-pronged test for issuance of a stay in the case of PRIMECO's, AT&T's, and WirelessCo's pending applications.

IV. CONCLUSION

As designated entities, Petitioners relied upon the umbrella of protection extended by Congress in enacting Section 309(j). The Bureau's April 12 decision to proceed with licensing of the A and B block winners erases the protections Congress extended to such parties. See Heckler v. Community Health Services, 467 U.S. 51, 61 n. 13 (1984) (quoting Brandt v. Hicke, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"). In light of the new legal arguments and the materially changed circumstances detailed above, Petitioners respectfully request that the Commission act expeditiously to grant this petition for reconsideration and defer licensing PRIMECO, AT&T and WirelessCo until the results of the C block auction are known and it can be objectively determined whether the statutory

^{26/} Id. at ¶ 13.

mandates to promote competition, avoid excessive concentration of licenses, and disseminate licenses among a wide variety of applicants have been met.

Respectfully submitted,

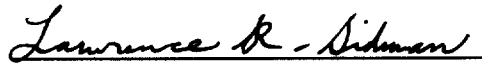
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May 12, 1995

DECLARATION OF A. DANIEL KELLEY

I, A. Daniel Kelley, declare as follows:

1. I am Senior Vice President of Hatfield Associates, Inc., where I conduct economic and policy studies for a wide variety of firms in the telecommunications industry.

a. My professional experience began in 1972 at the Antitrust Division of the U.S.

Department of Justice where I conducted economic analyses of mergers, acquisitions and business practices in a number of industries, including telecommunications. In 1979, I moved to the Federal Communications Commission ("FCC") where I held positions as Senior Economist in the Common Carrier Bureau and the Office of Plans and Policy. From September of 1979 to April of 1981, I was Special Assistant to the Chairman. In that position I advised the Chairman on common carrier regulation matters.

b. After leaving the FCC in 1982, I was Project Manager and Senior Economist at ICF, Incorporated, a public policy consulting firm. From September 1984 through July of 1990, I was employed by MCI Communications Corporation as its Director of Regulatory Policy. At MCI, I was responsible for developing and implementing MCI's public policy positions. In August of 1990, I joined Hatfield Associates, Inc. as Senior Vice President.

c. I received a Bachelor of Arts degree in Economics from the University of Colorado in 1969, a Master of Arts degree in Economics from the University of Oregon in 1971 and a Ph.D. in Economics from the University of Oregon in 1976. I have published research in antitrust and telecommunications economics and have testified before the California, Colorado, Connecticut, Florida, Georgia, Maryland, Massachusetts, New Jersey, New York, and Pennsylvania Public Utility Commissions, as well as the Federal Communications Commission. My testimony in these

proceedings has dealt generally with competition and pricing in telecommunications markets. A copy of my resume is attached as Appendix 1.

2. I have great familiarity with competition and pricing in telecommunications markets in general, and with PCS spectrum issues in particular. I submitted papers in various proceedings leading up to the PCS auctions and testified before the Commission on PCS issues on April 11, 1994.

3. The Communications Act establishes the following objective for the design of competitive bidding systems:

Promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

47 U.S.C. §309(j)(3)(A) In addition to this legislative requirement, there is an independent economic rationale for encouraging new players in telecommunications markets to enter the PCS field.¹ New entrants into wireless markets will bring a diversity of approaches to implementing PCS technology and devising new and innovative services. These benefits will be lost if a small number of very large firms dominate PCS. This is particularly true if these firms are already established telecommunications industry players. In addition, there is reason to believe that competition in individual markets will not be as vigorous when the competitors face each other in many other markets. These issues are discussed below.

¹ I previously addressed these issues in a paper entitled "An Efficient Market Structure for Personal Communications Services," submitted as an MCI Communications Corporation *ex parte* presentation on September 13, 1993. The following discussion draws from that analysis.

4. There are a number of benefits associated with a less concentrated industry structure.

Wireless technologies are relatively new and technologically dynamic. The business is subject to many types of equipment and service innovation. With a smaller number of carriers, market experimentation will tend to be reduced. Therefore, new market participants provide a greater potential for diversity in marketing strategies, pricing, service options and equipment choices. Even though firms with licenses in several markets may attempt different strategies across those markets, diversity and market experimentation are more likely if licensees are making independent marketing and technology choices.² To be more specific, a PCS supplier that is not also a cellular carrier is more likely to try new approaches and "rock the boat" than is a PCS supplier that is also a large cellular company.

5. This is particularly true since many of the existing cellular carriers are cooperating extensively with one another to develop technology and services:

Invoking antitrust protections under the National Cooperative Research Act, GTE Mobile Communications Service Corp. has filed notice of planned cooperative research to develop a new wireless data transmission technology. Joining it in the research project are Ameritech Mobile Communications, Inc.; Bell Atlantic Mobile Systems; McCaw Cellular Communications, Inc., NYNEX Mobile Communications Co.; PacTel Cellular; and Southwestern Bell Mobile Systems, Inc.³

McCaw is now owned by AT&T, while Bell Atlantic, NYNEX and AirTouch (the Successor to PacTel Cellular) are part of PCS PRIMECO.

² As Richard Nelson points out, "...differences in perception as to what are the best bets will have a greater chance to surface and be made effective in terms of diversity of R&D projects in a competitive regime than in a monopolized one." See "Assessing Private Enterprise: An Exegesis of Tangled Doctrine," Bell Journal of Economics, Spring 1981, p. 108.

³ See "GTE Mobile, Six Other Firms Plan Wireless Data Technology," Telecommunications Reports, May 10, 1993, p. 41.

6. Another factor to consider is that firms that meet each other in many markets may be less inclined to compete aggressively with each other in specific markets.⁴ Given the concentration of licenses, a carrier with a PCS license in a particular geographic region will likely be facing a carrier with whom it competes in other markets. For example, the top three bidders face each other in ten of the top twenty markets.⁵ The resulting mutual interdependence reduces the probability of aggressive price competition in individual markets.⁶

7. The A and B band PCS auction has resulted in a very high concentration of licenses. As Table 1 shows, the top three bidders have obtained licenses covering over 66 percent of the total Pops.⁷ Only ten firms account for over 95 percent of the licenses.

8. There are several other ways to measure the concentration of PCS licenses. Instead of concentration ratios, the US Department of Justice uses the Herfindahl-Hirshman Index (HHI) to measure concentration. The advantage of the HHI is that it takes account of the shares of all of the firms. The index increases as the number of firms falls and as the inequality of shares among the companies rises.⁸ As Table 1 shows, the HHI resulting from the A and B block PCS licensing process is 2010. This degree of concentration is high. For purposes of competitive analysis, the

⁴ See Jean Tirole, The Theory of Industrial Organization (1989), p. 243, for a discussion of multimarket contact.

⁵ APC and PhillieCo are affiliated with WirelessCo.

⁶ See Jean Tirole, The Theory of Industrial Organization, *supra*, note 12, p. 243 and p. 251, for a discussion of multimarket contact as a factor that facilitates tacit collusion.

⁷ Pops or population in the area licensed is a standard way of measuring the economic significance of a license.

⁸ See F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 1990, pp. 72-73 for a discussion of the HHI.